United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

ORIGINAL

77-7148

To be argued by
ALLEN F. LONDON

B

P/S

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

MICHAEL SALOUKAS,

Plaintiff-Appellant,

-against-

MICHAEL J. CODD, Police Commissioner of the City of New York,

Defendant-Appellee.

ON APPEAL FROM A JUDGMENT OF THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES COURT OF APPEALS
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SECOND CIRCUIT

APPELLEE'S BRIEF

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UNITED STATES COURT OF APPEALS

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MICHAEL SALOUKAS,

Plaintiff-Appellant,

-against-

MICHAEL J. CODD, Police Commissioner of the City of New York,

Defendant-Appellee.

ON APPEAL FROM A JUDGMENT OF THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLEE'S BRIEF

Preliminary Statement

In this civil rights action brought pursuant to 42 U.S.C. §1983 and 1988 plaintiff appeals from a judgment of the District Court for the Southern District of New York (Grisea, J.), dated March 11, 1977, denying plaintiff's motion for summary judgment and granting defendant's cross-motion for summary judgment.

Questions Presented

Plaintiff, formerly a police officer with the New York City Police Department (the "Police Department"), commenced this action alleging a deprivation of his civil rights arising out of his dismissal by the defendant. Plaintiff had been dismissed after a hearing on disciplinary

charges, and that dismissal was reviewed by the state courts in a proceeding brought pursuant to Article 78 of the CPLR. The questions presented are:

1. Is plaintiff's claim barred by the prior state court decisions under principles of res judicata?

2. Assuming, arguendo, that the principles of res judicata do not bar this action, has plaintiff stated a meritorious claim for relief under 42 U.S.C. §§1983 and 1988?

Facts

Michael Saloukas, the plaintiff, prior to his dismissal by defendant, served as a police officer in the New York City Police Department (A2-A6).* Prior to his dismissal, plaintiff had been tried on federal criminal charges of conspiracy to sell and actual sale of Federal Reserve Notes and had been acquitted after a trial in the United States District Court for the Eastern District of New York. Thereafter, plaintiff was served with departmental charges by the Police Department and, after an administrative trial, was found guilty of those charges and dismissed. The most serious of the charges of which plaintiff was convicted were the charges of conspiracy to sell and participation in the sale of counterfeit Federal

*Unless otherwise indicated, numbers in parenthesis preceeded by the letter "A" refer to the pages of plaintiff's Appendix.

Reserve Notes (Exhibit A, paragraphs 4-6).*

After his dismissal, plaintiff commenced a proceeding pursuant to Article 78 of the CPLR in the New York State Supreme Court challenging his dismissal. The proceeding was transferred on consent to the Appellate Division, First Department. (A6).

Plaintiff, in his Article 78 proceeding, claimed that:

> "being tried and acquitted in Federal Court of the criminal charges of (2) counts of counterfeiting should be a legal defense against a trial by the Police Department of the same charges."

(Exhibit A, paragraph 38; see also Exhibit A, paragraph 9.) Point I of plaintiff's brief in the Appellate Division was entitled:

> "double jeopardy, res judicata, or collateral estoppel is a complete legal defense against an administrative department trial where the precise and exact issue has previously been adjudicated by a federal court."

(Exhibit B, Point I; see also Exhibit B, pp. 4-11). Plaintiff also argued before the Appellate Division that he had been denied a speedy administrative trial (Exhibit A, paragraph 10). Point III of his brief before the Appellate Division was headed:

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*Plaintiff's appendix includes the affidavit of Allen F. London in support of defendant's motion for summary judgment but excludes Exhibits A and B thereto. (A38-A41). References to Exhibit A and Exhibit B are to Exhibits A and B to that affidavit.

> "The constitutional right to a speedy trial was abridged and violated by the Police Department in that the hearing examiner by his acts extended said hearings over a period of nineteen (19) months."

Plaintiff also claimed that the hearing examiner was biased (Exhibit A, paragraph 11). Point IV of his brief before the Appellate Division was headed:

> "The petitioner-appellant did not receive a fair, impartial and judicious hearing caused by the prejudice and bias of the deputy commissioner."

Each of these points was elaborated upon with extensive citations of authority. (Exhibit B, pp. 4-11 and 35-40). The Appellate Division unanimously dismissed plaintiff's petition and confirmed the determination of the Police Commissioner without opinion. 48 AD 2d 768 (1st Dept., 1975). Plaintiff's motions for leave to appeal to the Court of Appeals were denied by the Appellate Division and the Court of Appeals. 37 NY 2d 709 (1975). Plaintiff did not seek certiorari to the Supreme Court of the United States (A6, A39).

Thereupon, plaintiff commenced the instant action pursuant to 42 U.S.C. 1983 and 1988. (A2). His complaint alleged jurisdiction and under 28 U.S.C. §§1343, 2201, and 2202 (A2) and set forth two claims for relief: that the Police Department disciplinary

trial upon charges identical to those of which plaintiff had been acquitted after a criminal trial constituted double jeopardy and was barred by res judicata and collateral estoppel (A5, A7); and that plaintiff had been deprived of rights, privileges and immunities secured to him by the Constitution (A7-A9).

Pursuant to Rule 56(b) of the Federal Rules of Civil Procedure, plaintiff moved for summary judgment (A21). Defendant cross-moved for summary judgment on the grounds that "plaintiff's complaint is barred by res judicata and in any event fails to state a cause of action" (A33). Annexed to defendant's cross-motion were copies of plaintiff's Article 78 petition to the New York State Supreme Court and his brief to the Appellate Division (Exhibit A and B, respectively).

Opinion Below

District Judge Grisea granted defendant's motion for summary judgment, stating (A45-A47):

> "Defendant's motion for summary judgment dismissing the action is granted.
>
> Plaintiff was a New York City police officer. On August 30, 1971 he was indicted in the federal court in the Eastern District of New York on counterfeiting charges. He was tried and acquitted.

At about the same time as the indictment, the Police Department made disciplinary charges against plaintiff in connection with the alleged counterfeiting. The departmental hearing was delayed, but finally on June 6, 1974 plaintiff was found guilty. As a result, plaintiff was dismissed from the Police Department on July 16, 1974.

On October 25, 1974 plaintiff commenced an Article 78 proceeding in state court. The case was dismissed by the Appellate Division. Both the Appellate Division and the New York Court of Appeals denied leave to appeal to the latter court. Plaintiff did not seek certiorari in the United States Supreme Court.

Plaintiff brings the present action to attack his dismissal from the Police Department. He claims that the departmental hearing violated his protection against double jeopardy. He further argues that his acquittal on the criminal counterfeiting charge was a bar to the Police Department proceedings on theories of res judicata and collateral estoppel.

Summary judgment must be granted dismissing the complaint. The authorities are clear that

acquittal in a criminal action is no bar to an administrative proceeding such as occurred here within the Police Department. Also, the state court action is res judicata, and thus a bar to the present federal action.

The action is dismissed.

So ordered."

POINT I

PLAINTIFF'S CLAIMS ARE BARRED BY PRIOR STATE COURT DECISIONS UNDER THE DOCTRINE OF RES JUDICATA.

Plaintiff makes two principal arguments in support of his appeal. The first is that his dismissal after a trial on disciplinary charges constituted double jeopardy and was barred by res judicata and collateral estoppel. The second is that his dismissal from the Police Department violated his property and liberty rights under the Fourteenth Amendment.

Both of these issues were fully litigated in the Appellate Division of the New York Supreme Court. The claims of double jeopardy, res judicata, and collateral estoppel are specifically made at paragraphs 9 and 38 of the petition in the Article 78 proceeding (Exhibit A), and are fully argued in Point I of plaintiff's brief to the Appellate Division (Exhibit B). As to plaintiff's claim of deprivation of property and liberty rights, the deprivation of property or liberty does not violate the Fourteenth Amendment unless accompanied by a denial of due process. While no such denial is alleged by plaintiff

in his brief to this Court, it is noteworthy that due process claims of denial of a speedy trial and denial of a fair hearing were fully briefed before the Appellate Division. (Exhibit B, Points III and IV). Plaintiff's Fourteenth Amendment claim was therefore fully litigated before the Appellate Division.

While the Appellate Division denied plaintiff's petition without opinion, it is evident that it considered and passed upon the constitutional issues in question here. A determination in favor of plaintiff on any of those issues would have required either reversal of the determination to dismiss petitioner or at least a remand of the matter to the Police Commissioner.* Because the Appellate division dismissed plaintiff's petition, it follows a fortiori that it rejected each of his constitutional claims.

The Full Faith and Credit Clause of the United States Constitution requires that state court judgments be given the same res judicata effect in federal courts as in state courts even where federal constitutional questions are involved. American Surety Co. v. Baldwin, 287 U.S. 156 (1932); Gart v. Cole, 263 F. 2d 244 (2nd Cir.,

*Had the issues of double jeopardy, res judicata or collateral estoppel been determined in plaintiff's favor, the portion of the administrative findings which related to counterfeit notes would have been reversed. The remaining charges and specifications might have been sustained. However, in this event the Appellate Division would have been required to remand the matter to the Police Commissioner for a review of the penalty. Baumgartner v. Leary, 29 N.Y. 2d 873 (1971).

1958), cert. den. 359 U.S. 978 (1959). 28 U.S.C. 1738, is to a like effect. Mitchell v. National Broadcasting Company, No. 76-7376, slip op. 2715 (2d Cir., April 6, 1977). The plaintiff does not avoid the application of the principles of res judicata and collateral estoppel merely because he sues under the federal Civil Rights Act. Mitchell v. National Broadcasting Company, supra; Lackawanna Police Benevolent Association v. Balen, 446 F. 2d 52 (2d Cir., 1971); PI Enterprises v. Cataldo, 457 F. 2d 1012 (1st Cir. 1972); Taylor v. New York City Transit Auth., 433 F. 2d 665 (2d Cir., 1970). In the Lackawanna case the plaintiff in the state courts had unsuccessfully challenged the constitutionality of a New York statutory provision governing the number of hours worked by police officers. This Court, in a per curiam decision, held that the plaintiff's federal suit, brought under the Civil Rights Act, should have been dismissed on the ground that the state court judgment was res judicata. The Court stated:

> "Having lost in the state courts, plaintiff's remedy was to seek review by the Supreme Court. The Civil Rights Act, unlike federal habeas corpus, does not permit a second bite at the cherry. Howe v. Brouse, 422 F. 2d 347 (8 Cir. 1970); Scott v. California, 426 F. 2d 300 (9 Cir. 1970)."

Accord, Thistlethwaite v. City of New York, 497 F. 2d 339 (2d Cir., 1974).

Neither Lombard v. Board of Education, 502 F.

2d 631 (2d Cir., 1974), cert. den, 420 U.S. 976 (1975), nor Newman v. Board of Education, 508 F. 2d 277 (2d Cir., 1975), cert. den. 420 U.S. 1004 (1975), has changed this rule. Indeed, Judge Gurfein in Lombard specifically reiterated this principal (502 F. 2d at pp. 636-637):

> Of course, where a constitutional issue is actually raised in the state court, as it can be in an Article 78 proceeding by treating it as an action for a declaratory judgment, Matter of Kovarsky v. Housing and Development Administration, 31 NY 2d 184 (1972), the litigant has made his choice and may not have two bites at the cherry. See Thistlethwaite v. City of New York, 497 F. 2d 339 (2d Cir., 1974).

The Court in Lombard, supra, did state that the principles of res judicata could not be applied to bar a procedural due process claim brought pursuant to the Civil Rights Act where such claim had not been actually litigated in the state court proceedings. The issues here presented were fully litigated in the state tribunal.

In Newman, supra, this Court held that for a preclusion to be effective "elaborations or citations of authority" must be presented in the state court proceeding and not just a mere mention of the constitutional question. Clearly, that requirement is satisfied in the instant case. Plaintiff's argument on the points in question in the state court was exhaustive with abundant citations of authority. Having raised these specific constitutional objections in the state tribunal, plaintiff may not be here given a second bite at the cherry.

Lackawanna Police Benevolent Association v. Balen, supra 446 F. 2d 52; Thistlethwaite v. City of New York, supra 497 F. 2d 339; Taylor v. New York City Transit Authority, 433 F. 2d 665 (2d Cir., 1970); Brown v. Delavo, 498 F. 2d 1173 (10th Cir., 1974).

Following these principles, this Court, in a recent case, Pasqua v. New York City Employees Retirement System, Docket No. 76-7596, decided April 20, 1977, upheld the dismissal of a complaint in a civil rights action on the ground that the issues relating to a disciplinary proceedings had already been litigated in the state court.

POINT II

ASSUMING ARGUENDO THAT THIS ACTION IS NOT BARRED BY RES JUDICATA, THE COMPLAINT WAS PROPERLY DISMISSED BECAUSE IT DID NOT STATE A MERITORIOUS CLAIM FOR RELIEF.

(a)

Acquittal in a federal criminal trial does not act as a bar to a subsequent Police Department trial on similar charges.

Plaintiff argues that acquittal in a federal trial bars a subsequent New York City Police Department trial through the operation of the double jeopardy clause, res judicata, or collateral estoppel. These claims are without merit.

Plaintiff's claim of double jeopardy rests on the assertion in the complaint that his dismissal from the force has resulted in the loss of his job and pension, and in damage to his reputation (A7-A9). Plaintiff implies that the police disciplinary proceeding is thus transformed

into a criminal proceeding within the meaning of the double jeopardy clause. The mere fact that petitioner has suffered a loss, however, does not bring about such a transformation. See Helvering v. Mitchell, 303 U.S. 391 (1938) (tax penalty in a civil proceeding not precluded by acquittal after a criminal prosecution for tax evasion); Rex Trailer Co. v. U.S., 350 U.S. 148 (1956) (conviction of fraudulently obtaining surplus property not a bar to the imposition of a $2,000 penalty for each such act). As the Court stated in Helvering v. Mitchell, supra 303 U.S. at 399

> Congress may impose both a criminal and a civil sanction in respect to the same act or omission; for the double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense.

The Supreme Court has recognized that civil service disciplinary proceedings are civil in nature. In Gardner v. Broderick 392 U.S. 273 (1968), the Court, overruling the dismissal of a policeman for his refusal to waive immunity, stated (id. at p. 278):

> "If appellant, a policeman, had refused to answer questions specifically, directly and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himslf, Garrity v. New Jersey, . . ., the privilege against self-incriminaiton would not have been a bar to his dismissal."

Such a result would be impossible were disciplinary proceedings criminal in nature. See also Uniformed Sanitation Men v. Commissioner of Sanitation, 392 U.S. 280, 284 (1968); Fitzgerald v. Cawley, 368 F. Supp. 677, 680 (S.D.N.Y., 1973) (departmental trial not a criminal prosecution to which the double jeopardy clause would apply); Matter of Schuppe (Kirwin), 1 AD 2d 912 (3rd Dept., 1956), lv. app. den. 2 NY 2d 705 (1956); Zuckerman v. Gleason, 20 NY 2d 430 (1967) cert. den. 390 U.S. 925 (1968) (disbarment proceedings not criminal); Matter of Klebanoff 27 AD 2d 332 (1st Dept., 1967), aff'd 21 NY 2d 920 (1968). Thus defendant's acquittal of criminal charges does not bar a subsequent disciplinary proceeding for the same conduct.

Even if we assume arguendo that the Police Department disciplinary trial is criminal in nature, the plaintiff would still not prevail in his argument of "double jeopardy". The state, represented here by the municipality, and the federal government represent different sovereignties. U.S. v. Vaughan, 491 F. 2d 1096 (5th Cir., 1974). As the Supreme Court stated in Abbate v. U.S., 395 U.S. 187 (1959) at p. 194 (quoting from U.S. v. Lanza, 260 U.S. 377 at p. 382) "... An act denounced as a crime by both state and federal sovereignties is an offense against the peace and dignity of both, and may be punished by each." See also U.S. v. Barone, 467 F. 2d 247 (2d Cir., 1972).

Plaintiff's claims of res judicata and collateral estoppel must also fail. His claim of res judicata is inappropriate for two reasons. The cause of action in a criminal prosecution is different from that in an administrative disciplinary hearing. Helvering v. Mitchell, supra; Lawlor v. National Screen Corp., 349 U.S. 322 (1955); Cromwell v. County of Sac, 94 U.S. 351 (1876). Additionally the Police Department was not a party to the federal prosecution nor has any showing been made that it was "privy" to that prosecution. Plaintiff's claim of collateral estoppel is equally inappropriate. There is no privity between the Police Department and the United States in a criminal prosecution by the United States. Moreover, the fact that there is a higher standard of proof in a criminal trial than in an administrative trial* renders the doctrine of collateral estoppel inapplicable in any event. Helvering v. Mitchell, supra.

(b)

Plaintiff's claim that his dismissal violated his property and liberty rights under the Fourteenth Amendment is without merit.

Plaintiff asserts that he has been deprived of property and liberty rights protected by the Fourteenth Amendment. However, he does not assert that he was

*A determination after a disciplinary hearing will not be overturned if is is supported by substantial evidence. C.P.L.R. §7803(4).

denied due process, not does he make a showing with the requisite specificity. Fine v. City of New York, 529 F. 2d 70 (2d Cir., 1976). Thus plaintiff states no Fourteenth Amendment claim. Board of Regents v. Roth, 408 U.S. 564 (1972).

CONCLUSION

The judgment should be affirmed, with costs.

May 19, 1977.

Respectfully submitted,

W. BERNARD RICHLAND,
Corporation Counsel,
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LEONARD KOERNER,
ALLEN F. LONDON,
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AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL

State of New York, County of New York, ss.:

BRUCE GARNER being duly sworn, says that on the 18 day of MAY 1977, he served the annexed BRIEF upon LEONARD WEINTRAUB Esq., the attorney for the Appt. herein by depositing 3 COPIES of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the United States in said city directed to the said attorney at No. 350 - 5TH AVE. in the Borough of MANH., City of New York, being the address within the State theretofore designated by him for that purpose.

Sworn to before me, this
18 day of MAY, 1977

SHARON L. FEIGENBAUM
Commissioner of Deeds
City of New York No. 2-2762
Certificate Filed in New York County
Commission Expires August 1, 1979

Bruce Garner

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